

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell	)	
Infrastructure by Improving Wireless	)	WT Docket No. 16-421
Facilities Siting Policies;	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

**REPLY COMMENTS OF THE  
CALIFORNIA WIRELESS ASSOCIATION**

April 7, 2017

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The California Wireless Association (CalWA) hereby respectfully submits its Reply Comments in Docket No. 16-421 concerning whether the Commission should take additional steps, by interpreting relevant statutory provisions, to help promote deployment of needed wireless infrastructure while protecting localities' legitimate interests. Calwa's baseline position is that these additional steps are needed in order (1) to speed up the deployment of densified heterogeneous networks; (2) to reduce the costs of such deployments to a manageable level; and (3) ensure that deployments are effective to support the next wave of wireless advances including but not limited to 5G services.

CalWA has noted that one of its primary goals efforts to bring a unified voice to the wireless industry in California. That industry includes wireless carriers, large and small tower companies, fiber backhaul companies, equipment manufacturers and leasing companies, construction companies, site acquisitions vendors, placement companies, wireless advocacy groups, mobile software companies and chip manufacturers, real estate aggregators and the vast array of content providers in California that rely on advanced wireless networks as the principal platform for the entertainment and services they provide. A second but no less important goal is to educate our public decision makers about the importance of wireless services to both public safety and economic well-being. These legitimate public interests should guide a federal policy that prevents that politicization of the wireless permitting process that has been so detrimental to wireless infrastructure deployment efforts.

## **I. CALWA SUPPORTS THE FOLLOWING COMMENTERS AND THEIR FILINGS**

Several commenters submitted filings that offer sound reasoning and compelling factual support for an aggressive Commission action to facilitate deployment of wireless siting facilities. Among those commenters are the following entities and their especially pertinent comments:

### **1. U.S. Chamber of Commerce**

“Small cell and 5G technology have the potential to be an economic game changer for the American economy. According to one study, there are more connected devices in the world than there are people and there are expected be as many as 50 billion such devices worldwide by 2020. It has been argued that 5G wireless technology will be the backbone of the IOT revolution and the connected economy. 5G technology will improve data speeds, which will be vital to increasing the usage of telemedicine and autonomous vehicles. The new connected economy and Smart Cities will require the deployment of small transmission cells, some of which are the size of a pizza box. A recent report published by Deloitte demonstrates how industries such as energy, health, public safety and transportation will leverage the enhanced wireless technology, leading to substantial economic investment and job development throughout the country.” Chamber, at pp. 1-2.

### **2. The Wireless Infrastructure Association**

“The local codes almost always vest the local government with near unfettered discretion to deny the application for any number of reasons, including issues as broad and ambiguous as the “public interest” or “compatibility” with the character of the area.....A significant problem with these zoning requirements is that they are wholly discretionary and leave every location to

the whim of local politics. For example, in a Southern California city, one member sought to install a new node on an existing utility pole. Despite the fact that the member had obtained city approval to deploy over two dozen identical installations across the city, including in residential areas, in one case the city denied the application solely because of opposition from an organized group of residents. Such examples are extremely common.” WIA, at pp. 8-9.

3. T-Mobile USA, Inc.

*“Many municipalities require the same zoning process for small cell applications as used for macro tower sites—or have no clear application process. Often municipalities still review small cells the same way they review macrocells because they have either a telecommunications siting process designed for macrocells or no special process for telecommunications facilities—forcing applicants to contend with a long and costly process.<sup>12</sup> At least half of all jurisdictions fall into this category. Other municipalities (at least 15, in T-Mobile’s experience) have no clear application process at all, and some (five jurisdictions and growing) refuse to process small cell requests under ROW permitting processes.”* T-Mobile, at p. 7.

4. Lightower Fiber Networks

“The sole difference between the Lightower utility pole referenced above and others in its proximity is that Lightower intends to attach ‘wireless facilities’ to it. If Lightower wished to place this pole solely for the attachment of fiber optic cable, the additional review discussed above and attendant delays would not have occurred. Indeed, fiber attachment permits from local governments, where required, are typically issued in less than four weeks, and often within days. However, the affixation of an antenna on the pole has created the need for a three-part zoning application, which Lightower has been told will likely be denied because it will not meet the

legal standard under the zoning regulations as an ‘unconcealed wireless tower.’”

Lightower, at p. 8.

5. Verizon

“One recurring problem confronting Verizon as it seeks to deploy small cell facilities is the refusal or slow-rolling of negotiations by local governments. An unwillingness to engage in productive and timely negotiations is a gating issue that can stop deployment in its tracks.

Verizon has repeatedly encountered local jurisdictions that refuse to negotiate agreements to place wireless facilities in rights-of-way or on utility (including light and traffic) poles located in rights-of-way.<sup>16</sup> Most jurisdictions require master lease or license agreements (“MLAs”) before facilities can be placed in a right-of-way. MLAs generally establish the terms, including any one-time fees and per pole lease fees, for placing small cells in rights-of-way and on existing poles in the rights-of-way. But too often local officials simply refuse to negotiate such agreements.” Verizon, at p. 7.

6. ExteNet Systems, Inc.

“The [distributed network systems (DNS)] that ExteNet deploys are not designed based on local government boundaries and frequently are regional, covering multiple local jurisdictions. However, each local government that ExteNet approaches has its own set of rules and processes and potentially even more varied reactions to DNS facilities. This lack of consistency and clarity, alone, is a significant barrier to deployment, particularly as it impacts inherently regional or even statewide networks. As a result, ExteNet has little or no certainty regarding each community’s process, and cannot determine in advance how long it will take to deploy, what the fees will be, or if the same equipment will be permitted in one community

compared to its neighbors.” ExteNet, at p. 6.

7. Crown Castle International Corp.

“Crown Castle increasingly encounters jurisdictions that impose unreasonable fees and requirements to provide access for the installation of small cell networks in public rights-of-way. Below are just some of the examples that Crown Castle has observed across the country:

California: A number of California municipalities have established such onerous requirements as to effectively prohibit small cell installations within their jurisdictions.

- The City of Newport Beach has created an untenable situation by seeking excessive fees for use of the City’s poles and denying applications for new pole construction. Based on a CBRE, Inc. market rent survey commissioned by the City, Newport Beach has adopted a new wireless ordinance that recommends a baseline annual rent of \$10,800 per node site—more than 50 times the average FCC rate for wireless pole attachments. When Crown Castle determined that the most prudent approach would be to construct its own poles, Newport Beach denied Crown Castle’s applications, claiming that the proposal created aesthetic concerns. Thus, for Crown Castle to access the right-of-way, it must use the City’s poles and pay the monopolistic fees established by the City. As a result, Crown Castle has reevaluated its planned deployment for Newport Beach.
- The City of Carlsbad is making it impractical for Crown Castle to continue operating a network of 90 plus nodes that have been in operation for approximately 10 years. During negotiations to renew the existing agreement with the City, Carlsbad has proposed an approximately 2100% increase in the baseline

annual attachment fee, using the inflated price from the study that CBRE prepared for Newport Beach.”

Crown, at pp. 11-12.

8. Sprint Corporation

“Another problematic action by local governments is the imposition of siting requirements that question a carrier's network design. Such actions violate Section 253 because any local government action that prevents a technology upgrade has the effect of prohibiting the provision of service.

Different technological standards and spectrum allocations require different antenna locations, heights, and spacing for different carriers. What worked for 2G may not work for 3G, 4G or 5G. What works for 800 MHz may not work at 2.5 GHz, and what works at 2.5 GHz may not work at the higher frequencies the Commission approved for mobile broadband use last year. If a carrier's antenna locations are frozen based on earlier network architectures, it cannot effectively provide service as technology changes.

Section 6409 doesn't help in this circumstance. While it allows for antenna or equipment upgrades at a particular location where there already are wireless facilities, it does not make it easier for carriers to install new wireless facilities, to relocate or reposition antennas to meet revised spectrum and radio needs, or to move cells to new locations based on the carrier's own evaluation of its network needs.” Sprint, at pp. 21-22.

9. AT&T Services, Inc.

“Realizing the promise of 5G technologies (including millimeter wave spectrum that propagates over a relatively short distance) requires the nationwide deployment of small cell

networks, composed of 10 to 100 times more antenna nodes than existing networks. For example, AT&T has announced plans to install over 1,000 small cell antennas across the Bay Area alone in 2017, with many other small cell projects underway or planned across the country. Indeed, it has been estimated that the wireless industry will deploy more small cell facilities in the next three and a half years than the number of macro sites it has installed over the last three and half decades! Moreover, these small cells will predominantly be deployed in the ROWs, such as on utility poles, street light poles, and traffic lights. ROWs and existing ROW structures present service providers with the only reasonably available, high volume inventory of low-elevation vertical structures that are near the very customers who need increased network capacity and performance.

Some local governments, however, have placed obstacles in the way of wireless facility expansion, even for unobtrusive small cell equipment. Those local barriers significantly delay and increase the cost of small cell deployments, reduce the scope of those deployments (i.e. fewer nodes deployed because of higher costs), and in some cases cause the provider to abandon the project altogether. The impact of these actions can be felt not only in the locality creating the barriers, but also in smaller communities further down the construction schedule. The Commission must act now to remove these deployment barriers so that providers can meet exploding demands on their networks and deploy the infrastructure that will enable the United States to maintain its world leadership in wireless broadband deployment.” AT&T, at pp. 3-4 (footnotes omitted).

#### 10. Nokia

“Fees can threaten the economics of a deployment. Nokia has experienced site



‘inspection fees’ of \$3,000 or even \$4,000 applicable to each location. Such per-location fees are particularly unreasonable when put in the context of hundreds of small cells planned for a single deployment. Many localities lack personnel to inspect individual macro-cell sites; it is hard to imagine the timeframes and expense that would be applied to small cell deployments under the current approval framework. That does not include other application fees and recurring fees associated with accessing the location.

Making matters worse, third party consultants see the complexities of city-wide deployments as a business opportunity, becoming a middle man. Unfortunately, the goal of the consultant is often not to maximize connectivity, but rather to maximize city revenues. Consulting agreements often provide broad marketing and management services rights, which include revenue sharing options with the locality based on the lease terms that the third party is able to negotiate with the carrier.” Nokia, at p. 6.

## 11. CTIA

“Importantly, DAS and small cell facilities provide substantial benefits to both urban and rural consumers. In addition to increasing coverage and providing much needed capacity in urban areas, low-powered technologies such as DAS and small cells provide carriers with lower cost options for increased deployments in rural areas, which in turn increases competition in rural markets. And low-powered technologies offer more flexible siting options than macrocells for both national and regional carriers that are deploying mobile broadband in rural and remote areas, which can reduce deployment costs and increase scalability. Streamlining siting policies for DAS and small cells will therefore benefit urban and rural Americans alike.

Yet, the costs and delays resulting from the web of federal, state, local, environmental,

cultural, and historic review processes that must be undertaken when deploying wireless infrastructure will only be compounded as providers seek to deploy the numerous small sites needed for 5G and for meeting increasing network capacity needs. These costs and delays will only further shift resources away from wireless network investment and innovation. As Commissioner Pai recently stated, this “creaky regulatory approach . . . holds American consumers and businesses back.” CTIA, at pp. 3-4.

## **II. THE CHALLENGE TO DEPLOYMENT IN CALIFORNIA CITIES**

While supporting the above comments from wireless carriers and infrastructure providers, Calwa can also speak to some of the regulatory burdens in wireless deployment throughout the State of California. Our members continue to report that the deployment of wireless infrastructure is delayed at dozens of jurisdictions in California, due predominantly to three factors:

1. The first factor is that some local municipalities currently require a separate discretionary permit for each “node” or “antenna” being placed in the ROW. As many small cell deployments envision a system with “nodes” or “antennas” numbering from 50-200, a separate discretionary permit per node is duplicative, cost prohibitory, burdensome on local resources, and lacking in common sense.
2. The second item consistently mentioned by our constituents is the length in time for various government approvals. Similar to the comments cited above, Calwa notes that it is not unusual to see jurisdictions with multiple approval processes, sometimes resulting in deployments that take more than a year for local approvals. Calwa supports efforts of the FCC to implement small cell siting time

limits.

3. Lastly, application fees, attachment fees, and 3rd party consultant fees continue to be a barrier to deployment of this critical infrastructure. The FCC should appropriately set limits on all three items, as helping to achieve cost certainty would be an effective measure to encourage 5G deployment.”

### **III. LOCAL GOVERNMENT PRACTICES THAT HAVE THE EFFECT OF PROHIBITING SERVICES**

The Commission has requested comment on a possible review of state of the law concerning the “prohibition” or “effective prohibition” of services under Section 253(a) and Section 332(c)(7)(B). Several commenters support this review and Calwa agrees. In the absence of active Commission involvement on the question of effective prohibition, the courts have resorted to creating their own “technical” standards and the wireless industry has had to face the ill-informed impacts of this judge-made regulatory law.

One glaring example of judge-made standards concerns the definition of effective prohibition under Section 332(c)(7)(B)(i)(II). In the absence of an FCC standard, the courts manufactured the rule that has plagued deployment efforts for over a decade. A carrier can bring an effective prohibition claim only where there is a “significant gap in coverage” and the carrier has conducted a comprehensive alternative site analysis that demonstrates the selected location is the “least intrusive means” of providing the services. Years of litigation have resulted in split decisions on the meaning of these terms. But the first real failure of the test occurred when cities sought to define “significant gap in coverage.” They turned to municipal consultants who concocted coverage metrics designed to show the presence of an RF signal -- however weak -- to prove that no coverage gap existed. In many cases that analysis was blatantly wrong, but even if

that analysis might have been correct, this test prevented carriers from pressing cities to allow them to address serious capacity issues in cases where dropped calls and access issues arose not from the lack of a signal but rather from the limited capacity and growing use of the system. Today, this test has even less relevance to deployment because the question facing carriers is not how to provide coverage but how to ensure that ultra high data speeds meet the demands of consumers who expect fully functional and high quality mobile video and high bandwidth applications. The analysis of what is an adequate data speed and what is sufficient densification to support demand cannot be left to the courts. The Commission can provide a tremendous public service by curtailing this judge-made regulatory law.

The same problem exists with Section 253(a). Both WIA and Extenet have written a comprehensive history of that problem. See WIA, at pp. 25-39; ExteNet, at pp. 20-33. Earlier court decisions followed Commission guidance on Section 253 and acknowledged the limited authority local jurisdictions had over placement of telecommunications facilities in the public rights of way. Those courts found that local ordinances could “have the effect” of prohibition if those ordinances were overly discretionary and therefore contaminated the permitting process with personal preferences or local politics. When the Eighth and Ninth Circuit Courts re-read Section 253(a) and concluded that prohibitory effects had to be both actual and insurmountable, those courts eliminated the notion that local ordinances and regulatory systems might have the effect of being prohibitive and limited Section 253(a) to claims of “actual” prohibition, eliminating any real life option of bringing “effective prohibition” claims. What the wireless industry is now facing in many jurisdictions is *effective* prohibition of services resulting from delays, excessive fees and NIMBY-based decisions that, for example, use “aesthetics” as a proxy

for decisions based on politics, personal preferences, or unsupported local fears about the health impacts of RF emissions.

The solution is not to ask the courts to revisit these decisions and render regulatory decisions but rather for the regulators to establish the rules that clarify when and under what circumstances local actions violate Sections 253(a) and 332(c)(7)(B).

#### **IV. CONCLUSION**

Calwa welcomes the opportunity to submit these Reply Comments in this wireless facilities siting proceeding and looks forward to a Commission Report and Order that fully and comprehensively addresses the impediments our industry faces as it seeks to deploy the densified and heterogeneous network infrastructure desired and needed so badly by the citizens of our country.